

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF DELAWARE  
VOLUME 1

IN RE: IN THE MATTER OF :  
THE REQUEST OF TEN CUSTOMERS :  
TO INITIATE AN INVESTIGATION :  
INTO WHETHER VERIZON DELAWARE, : PSC DOCKET NO. 06-179  
INC., AND AT&T COMMUNICATIONS :  
OF DELAWARE, LLC, HAVE :  
IMPROPERLY SHARED TELEPHONE :  
RECORDS (FILED MAY 25, 2006) :

Public Service Commission Hearing taken  
pursuant to notice before Gloria M. D'Amore, Registered  
Professional Reporter, in the offices of the Public  
Service Commission, 861 Silver Lake Boulevard, Cannon  
Building, Suite 100, Dover, Delaware, on Tuesday, June  
20, 2006 beginning at approximately 1:05 p.m., there  
being present:

APPEARANCES:

On behalf of the Public Service Commission:  
ARNETTA McRAE, CHAIR  
J. DALLAS WINSLOW, COMMISSIONER  
JAY LESTER, COMMISSIONER  
JOANN CONAWAY, COMMISSIONER  
JEFFREY CLARK, COMMISSIONER

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1 APPEARANCES CONTINUED:

2 On behalf of the Public Service Commission Staff:  
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3  
4 On behalf of the Public Service Commission Staff:  
REGINA A. IORII, ESQUIRE

5 On behalf of the Public Service Commission Staff:  
BRUCE H. BURCAT, EXECUTIVE DIRECTOR

6 KAREN J. NICKERSON, SECRETARY

7 On behalf of the Office of the Public Advocate:  
G. ARTHUR PADMORE

8  
9 On behalf of the  
AMERICAN CIVIL LIBERTIES UNION OF DELAWARE:

10 JULIA M. GRAFF, ESQUIRE  
DREWRY FENNELL, ESQUIRE

11 On behalf of AT&T & TCG DE VALLEY:  
DAVID W. CARPENTER, ESQUIRE

12 WENDIE C. STABLER, ESQUIRE

13 On behalf of VERIZON DELAWARE, INC.:  
LEIGH A. HYER, ESQUIRE

14 ANTHONY E. GAY, ESQUIRE

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1                   CHAIR McRAE: Moving onto the next  
2 matter, which is the complaint of various parties brought  
3 by the ACLU against Verizon and AT&T.

4                   Would the parties come forward?

5                   MR. MYERS: Madam Chair. It's a strange  
6 world to see AT&T and Verizon at the same table.

7                   CHAIR McRAE: Yes. We ought to have had  
8 a photograph so we can post it on the Commission wall.

9                   I understand Julia Graff is representing  
10 the ACLU.

11                   Would you all indicate who you are for  
12 the record.

13                   MS. GRAFF: I'm Julia Graff representing  
14 the ACLU.

15                   MS. FENNEL: I'm Drew Fennell also  
16 representing the ACLU.

17                   MR. GAY: Anthony Gay, as I'm sure you  
18 Commissioners know.

19                   I would like to introduce Leigh A. Hyer,  
20 who is new Mid-Atlantic General Counsel for Verizon.

21                   CHAIR McRAE: Welcome.

22                   MR. CARPENTER: David Carpenter  
23 representing AT&T.

24                   MS. STABLER: Wendie Stabler. Local

1 counsel representing AT&T.

2 CHAIR McRAE: Since the ACLU is the  
3 Complainant, you might want to begin.

4 MS. GRAFF: I would like to start by  
5 thanking the Commissioners for taking the time to give  
6 us, as well as counsel for Verizon and AT&T, the  
7 opportunity to speak here today.

8 I would also like to thank my colleagues  
9 from other phone companies, as in some cases, traveling  
10 great distances to be here today so all viewpoints might  
11 be aired.

12 I hope my comments will be of assistance  
13 to the Commission in its deliberations.

14 Let me start by clarifying what the ten  
15 complainants and the 110 Delawareans who submitted their  
16 names in support of our complaint are not asking of this  
17 Commission.

18 They're not asking for an investigation  
19 into the legality of the NSA Domestic Surveillance  
20 Program.

21 They're not asking you to sift through  
22 reams of top-secret government information, which in the  
23 hands of Al Qaeda Operatives, might jeopardize national  
24 security.

1                   We are not here today to talk about  
2                   foreign intelligence surveillance, although AT&T and  
3                   Verizon might like you to think that we are.

4                   We are talking about the surveillance of  
5                   domestic phone calls where both parties are in the United  
6                   States, and at least one of them is right here in  
7                   Delaware.

8                   Delaware telephone customers have a  
9                   right to know whether information about their phone use  
10                  is not being kept private.

11                  All the complainants are asking this  
12                  Commission to do is investigate whether Verizon and AT&T  
13                  handed over the private call records of Delaware  
14                  subscribers without a subpoena, a court order, or other  
15                  lawful authority. If they did so with no lawful  
16                  authority from the Federal government, then they may have  
17                  violated Delaware privacy and Consumer Protection Laws.

18                  Furthermore, the complainants request  
19                  that this Commission take action within its power to  
20                  ensure that such violations do not continue to take place  
21                  in the future.

22                  We respectfully suggest that this could  
23                  take the form of issuing regulations governing the  
24                  privacy of the customers call records of regulated

1 utilities, and we are prepared to submit a model  
2 regulation should the Commissioner so desire.

3 In their responses to the ACLU's request  
4 for a Commission investigation, Verizon and AT&T have  
5 attempted to hide behind a misreading of the Commission's  
6 authority and a misapplication of an evidentiary  
7 privilege.

8 In support of my client's position, I  
9 offer the following.

10 First, the Commission has both the  
11 authority and the obligation to investigate whether and  
12 to what extent Verizon and AT&T, if their actions in  
13 Delaware, impinge on the privacy rights of Delaware's  
14 telephone subscribers violate Delaware law.

15 Second, the statutory immunities that  
16 AT&T cites in its response only apply where a  
17 telecommunications company relies in good faith on a  
18 warrant, subpoena, court order, or other lawful authority  
19 which may include the written certification of the  
20 Attorney General of the United States, and where the  
21 underlying investigation is not conducted, as it is here,  
22 solely on the basis of activities protected by the First  
23 Amendment activities.

24 Third, Verizon and AT&T cannot assert

1 the state secrets privilege to shield themselves from  
2 this investigation.

3 If you'll permit me, I can outline these  
4 arguments in further detail to aid the Commission in its  
5 deliberations.

6 The Commission has both the authority  
7 and the obligation to investigate whether these companies  
8 have put the rights and well-being of their Delaware  
9 subscribers at risk.

10 The Commission's grant of authority from  
11 the Legislature is broad and robust, and evidences an  
12 intent by the Legislature that this Commission should  
13 actively investigate and regulate public utilities in the  
14 State of Delaware.

15 The jurisdictional statute for the  
16 Public Service Commission states in Title 26, Section  
17 201(a) that the Commission shall have exclusive original  
18 supervision and regulation of all public utilities.

19 Public utilities, like Verizon and AT&T,  
20 willingly submit to the authority of the members of this  
21 Commission as a condition of being allowed to do business  
22 in this State.

23 The only reason these companies even  
24 have this caller information is because the members of

1 this Commission have permitted these companies to operate  
2 in this State. For them to now argue that this  
3 Commission lacks the power to oversee how they are using  
4 that license to operate is deeply troubling to those of  
5 their customers in Delaware who look to this Commission  
6 to regulate and supervise utilities doing business here.

7 Section 206 states that the Commission  
8 may investigate upon its own initiate or upon complaint  
9 in writing any matter concerning any public utility.

10 Section 207 of the Legislature grants  
11 the members of the Commission access at all times and the  
12 right to inspect and examine any and all books, accounts,  
13 records, memorandum, property, plant, facilities and  
14 equipment of all public utilities.

15 This Commission's own Regulation No.  
16 10 800 020 No. 3.1 on the Availability of Records states,  
17 All books, accounts, papers, records, memorandum required  
18 by these rules or which are necessary for the  
19 administration thereof, shall be open and available for  
20 examination by the Commission or its authorized  
21 representatives at all times.

22 The power to investigate and regulate  
23 public utilities, such as Verizon and AT&T, was upheld by  
24 the Delaware Court of Chancery in the 1985 case called



1 Lipstein versus Diamond State Telephone in which the  
2 Court of Chancery confirmed that the 1974 revision of  
3 Section 201(a) demonstrated a legislative intent to  
4 invest in the Commission exclusive jurisdiction over all  
5 matters concerning supervision and regulation of public  
6 utility rates and services.

7 Under Section 209(a) of Title 26, the  
8 Commission is empowered to fix just and reasonable  
9 practices and services by order after the hearing.

10 As I mentioned before, this could take  
11 the form of issuing regulations to ensure that customer  
12 privacy is not compromised in the future. And I have a  
13 copy of the model regulations, if you would like that.

14 Like all other public utilities in the  
15 State of Delaware, Verizon and AT&T are subject to  
16 special regulation and oversight by the State. These  
17 companies are not free to declare when that regulation  
18 and oversight does and does not apply. Because this  
19 Commission has exclusive jurisdictional authority,  
20 jurisdictional authority with respect to the challenged  
21 activities.

22 Furthermore, similar investigations are  
23 being opened by other State Public Utility Commissions,  
24 such as Washington and Vermont. Maine has begun to look

1 into the matter.

2 My second point with respect to the  
3 immunities claim by AT&T in its response.

4 AT&T, in its response, cites several  
5 Federal statutes pertaining to national security and  
6 classified information, and states that these statutes  
7 offer the company immunity, even if the company did  
8 violate Delaware and Federal law by handing over private  
9 information.

10 The companies may, as AT&T argued, be  
11 shielded from liability for violating State and Federal  
12 laws. AT&T's response includes a footnote that cites  
13 several Federal statutes, such as 18 USC Section 2511(2),  
14 which provide absolute immunity from the claims in the  
15 ACLU complaint.

16 However, that statute requires that  
17 before complying with the Federal request for assistance,  
18 the telecommunications company must receive a  
19 certification in writing from the U.S. Attorney General  
20 that no warrant or court order is required by law, and  
21 that all statutory requirements are met and that the  
22 specified assistance is required.

23 We are not asking this Commission to  
24 penalize AT&T or Verizon for providing information

1 required under lawful authority.

2 We are requesting that the Commission  
3 merely investigate whether this information was handed  
4 over under lawful authority.

5 If the companies did do so, after  
6 receipt of a certification in writing, then let them  
7 prove that to the Commission.

8 Similarly, as indicated in one of AT&T  
9 exhibits, Electronic Communications Privacy Act also  
10 confers absolute immunity on communication providers  
11 acting with government authorization. This is in Section  
12 2703 of Title 18.

13 Again, we do not dispute this. We  
14 merely want to know whether such authorization did,  
15 indeed, come from the Federal Government or whether the  
16 companies volunteered private customer information  
17 without lawful authority.

18 Again and again the statutes cited by  
19 AT&T in its response, Section 1805, Section 2702, Section  
20 3124, all of these statutes only extend absolute immunity  
21 if the company received a certification for foreign  
22 intelligence surveillance, not domestic, or for providing  
23 assistance pursuant to court order or a request for  
24 emergency assistance or for providing investigative

1 assistance on demand of lawful authority.

2 Third, as for the state-secrets  
3 privilege that Verizon and AT&T --

4 CHAIR McRAE: Excuse me. How many  
5 arguments do you have there? Are you, basically,  
6 reading? We do have your documents, as well.

7 MS. GRAFF: I am just responding to some  
8 information in their responses that I did not allude to  
9 in my complaint. I will be brief.

10 The state-secrets privilege that Verizon  
11 and AT&T asserts is misused in the case.

12 First, as the case cited by AT&T,  
13 Ellsberg, makes it clear the privilege may be asserted  
14 only by the government itself. Neither a private party  
15 nor an individual official may seek its aid. To my  
16 knowledge, the government has not intervened in this  
17 case.

18 Second, the privilege must first be  
19 formally claimed by the head of the department that has  
20 control over the matter.

21 Third, the Supreme Court has made it  
22 clear that this privilege is not to be lightly invoked.  
23 The privilege may not be used to shield any material, not  
24 strictly necessary to prevent injury to national

1 security, and, whenever possible, sensitive information  
2 must be disentangled from nonsensitive information to  
3 allow for the release of the latter.

4 In this case, the government has not  
5 shown how it is even remotely plausible that the fact of  
6 public awareness of whether these companies violated  
7 Delaware law by handing over their private records  
8 without court order would jeopardize national security.

9 As I've stated before, we are not asking  
10 this Commission to delve into the precise methods which  
11 this information was recorded, or what the National  
12 Security Agency may or may not have done with it once it  
13 received it.

14 You have before you a very limited  
15 inquiry. Did either of these companies turn over the  
16 confidential records of their Delaware customers without  
17 a subpoena? That's all we want to know.

18 If the allegations contained in our  
19 complaint are true, then the company are cooperating in a  
20 surveillance program of the privacy of Delaware telephone  
21 customers under the legal and regulatory guardianship of  
22 this Commission.

23 We are here simply to make the point  
24 that the citizens of Delaware are entitled to know

1 whether regulated utilities in their state are violating  
2 their privacy. The only state secret at issue in this  
3 case is whether regulated utilities violated Delaware  
4 law, and they are now hiding their misconduct behind an  
5 evidentiary privilege that does not belong to them.

6 CHAIR McRAE: Thank you.

7 COMMISSIONER CLARK: Madam Chair, I  
8 have some general questions.

9 You mentioned three Public Service  
10 Commissions or Public Utility Commissions that are  
11 currently looking at the issue.

12 How many complaints, such as this, were  
13 filed across the company? Do you know?

14 MS. GRAFF: There are 25 ACLU affiliates  
15 before Public Utility Commissions.

16 COMMISSIONER CLARK: And three of them  
17 are actively or semi-actively undertaken a review?

18 MS. GRAFF: To my knowledge Washington,  
19 Vermont and Maine.

20 COMMISSIONER CLARK: Just one other  
21 question.

22 How many courts is it working its way  
23 through now at the same time?

24 MS. GRAFF: I believe this was alluded

1 to in the AT&T material. They would be more able to  
2 answer this question. But several courts. I think,  
3 maybe, 20 that have been consolidated.

4 MR. CARPENTER: I'll respond.

5 COMMISSIONER CLARK: All right. Thank  
6 you.

7 CHAIR McRAE: Very good. Now, is it  
8 AT&T? Which order?

9 MS. STABLER: Mr. Carpenter will speak.

10 MR. CARPENTER: Madam Chair and Members  
11 of the Commissioners.

12 First, to respond to your question,  
13 there are currently 34 nationwide class action Federal  
14 Court lawsuits that have been brought against AT&T,  
15 Verizon, and other telecommunication carriers challenging  
16 the same conduct that the ACLU has challenged here.

17 In addition, there is a lawsuit that the  
18 United States Government has brought against the one  
19 state that is attempting to investigate these matters,  
20 and that's New Jersey.

21 And in that suit, the Federal government  
22 is asserting that this investigation is something that  
23 the states have no jurisdiction over for Federal law.  
24 Both because the subject matter of the case is national

1 security, which is an exclusively federal function, and  
2 because federal statutes prohibit the carriers from  
3 providing the kind of information about the  
4 certifications and the other things to which Ms. Graff  
5 refers. And that because Federal law prohibits the  
6 disclosure of this information to state authorities.

7 Any efforts by state authorities to  
8 obtain this information are preempted. And in this  
9 lawsuit, accordingly, the United States seeks to enjoin  
10 the State Attorney General from conducting the  
11 proceeding, and seeks to enjoin AT&T, Verizon and the  
12 other carriers, who are the subject of that subpoena  
13 there, from responding to the subpoena.

14 So, this is a real situation where the  
15 carriers here are caught in the middle.

16 Federal law prohibits us from providing  
17 the information that you would need to conduct any sort  
18 of meaningful investigation. And that's why we would  
19 submit that the investigation shouldn't proceed. And  
20 that what you should do is dismiss the case now, or, at  
21 the very minimum, exercise your authority under Rule 16  
22 to defer proceedings until these many Federal proceedings  
23 are concluded.

24 One thing you'll get an answer to,



1 particularly, as a result of this lawsuit, the United  
2 States has brought against the New Jersey authority and  
3 against the carrier, is whether you have any authority at  
4 all to proceed.

5 I think it's quite clear, and I'll go  
6 into this in a little more detail, why a Federal law  
7 would preempt you from this proceeding. But if you have  
8 any doubt that, there's a case pending right now where  
9 that question is teed up and is going to be decided.

10 And I would submit that you should  
11 dismiss the case. But at a minimum, you should defer  
12 proceeding and see what the outcome is in that case.

13 But that's a response to your question.

14 And as you probably don't know, I'm one  
15 of the lawyers who is representing AT&T in what is truly  
16 a nationwide, federal litigation, arising from these  
17 allegations, allegations that AT&T, Verizon and other  
18 carriers have acted unlawfully in been providing calling  
19 record information to the National Security Agency in  
20 connection with the Anti-terrorist Surveillance Program  
21 that it initiated following 9/11.

22 We've provided very, I guess,  
23 comprehensive information.

24 CHAIR McRAE: Three trees.

1 MR. CARPENTER: Pardon me?

2 CHAIR McRAE: Three trees.

3 MR. CARPENTER: Yes. Unfortunately, we  
4 did some damage to our nation's forest.

5 And I'm not going to endeavor here to  
6 repeat all of this. But I just want to highlight the  
7 basic facts about this litigation because I think  
8 Ms. Graff's claims here really proceed from a  
9 misapprehension of the nature of the Federal interest  
10 that have been involved. And, particularly, a  
11 misapprehension of the prohibition that simply precludes  
12 carriers from providing you with information that you  
13 need to conduct the information, and that preclude you  
14 from conducting any meaningful investigation.

15 This Commission, obviously, has plenty  
16 of authority over carriers that can be exercised in  
17 almost any other imaginable situation.

18 But in this particular situation,  
19 Federal law precludes you from proceeding. And to  
20 attempt to do so would be really an exercise in futility  
21 that would put carriers in an impossible position where  
22 we can be caught between the competing demands of State  
23 authorities and Federal authorities. And because under  
24 the Federal Constitution, Federal law is Supreme, we're

1 going to have to comply with the demands from the Federal  
2 authorities.

3 But the history of this is something I  
4 can just layout. It's, probably, worthwhile to take a  
5 minute to layout.

6 The basic disclosures about this  
7 Anti-terrorist program were made in a New York Times  
8 article that appeared last December.

9 The President then acknowledged that,  
10 indeed, the NSA is conducting a Wanted List Terrorist  
11 Surveillance Program, which is targeted at communications  
12 to and from suspected Al Qaeda agents.

13 At the same time the President made  
14 these disclosures, the Justice Department submitted a  
15 lengthy legal justification for the program to Congress,  
16 which was placed before the House and Senate  
17 Subcommittees on Intelligence.

18 Then last January, the first of what are  
19 now 34 Federal Court consumer class action lawsuits were  
20 brought against AT&T, defendant.

21 This first case is called  
22 Hepting v. AT&T. It was filed in the Federal Court in  
23 San Francisco. And one of the main allegations there is  
24 the same allegation here, that AT&T has been providing

1 access to calling records without lawful authorization.

2 The allegation that Ms. Graff referred to.

3 AT&T moved to dismiss the case on a  
4 number of grounds. One of which is one that relies on  
5 these statutory immunities that Ms. Graff discussed.

6 The main one being if we have a certain  
7 certification from the Attorney General that we are  
8 immune from suit.

9 Now, the key fact is that the United  
10 States then moved to intervene in the case and moved to  
11 dismiss by invoking what's known as the Military State  
12 Secrecy Privilege. This is not an evidentiary privilege.  
13 This is a constitutionally-based doctrine that entitles  
14 the United States to prevent the litigation, the factual  
15 claims, when that would require in the judgment of the  
16 senior officials of the United States, disclosure of  
17 information that would risk harming the national security  
18 or the intelligence gathering capabilities of the United  
19 States.

20 As Ms. Graff correctly says, this is a  
21 privilege that can only be invoked by the United States,  
22 and under the Supreme Court decision, has to be invoked  
23 by the head of a department.

24 Here the privilege was invoked by

1 Ambassador Negrem Ponte, the Director of National  
2 Intelligence.

3 He said that any disclosure of  
4 information involving the potential subjects of the  
5 surveillance activities, whether AT&T is participating or  
6 not in these surveillance activities, and the scope of  
7 the activities is all projected by the State Secrets  
8 Doctrine.

9 In particular, certification that  
10 Ms. Graff says this Commission should investigate whether  
11 AT&T and Verizon has received are things that the United  
12 States specifically identify as information that can't be  
13 disclosed without revealing state and military secrets.

14 So, in that lawsuit, when discovery was  
15 sought on the issue of whether AT&T has the  
16 certification, the government opposed it, and the  
17 District Court ruled that no discovery can proceed. That  
18 AT&T cannot disclose any evidence about certification.  
19 The evidence that Ms. Graff says that you should be  
20 trying to get from us until there has been a  
21 determination of this threshold issue whether the  
22 Military State Secrets Doctrine is properly invoked.

23 If the District Court finds it has been  
24 properly invoked, which is determination that the

1 District Court will make under the law reviewing  
2 classified documents that have been submitted by  
3 Ambassador Negrem Ponte and the head of the NSA, General  
4 Alexander, then it is the District Court's role or job in  
5 Supreme Court cases to dismiss the suit.

6 Now, Hepting is not the only case, as I  
7 mentioned before in response to the question about the  
8 number of cases. There have been 34 other cases that  
9 have been filed. And a petition has been filed with the  
10 Judicial Panel on Multi District Litigation to  
11 consolidate all these 35 floor cases, and also cases that  
12 have been brought against the United States Government  
13 before a single court for consolidated proceedings.

14 And one of the reasons for this proposed  
15 consolidation is that it will centralize review of what  
16 the Government represents to be highly sensitive,  
17 classified information in order to minimize the risk that  
18 it has disclosed too broadly.

19 Now, members of Congress responded to  
20 the U.S.A. Today article that was published on May 11th,  
21 and, basically, lead to all of these lawsuits.

22 Members of Congress responded by asking  
23 the FCC to exercise its general regulatory authority,  
24 which as the Interstate Services, is the same as this

1 Commission's authority over Intrastate Services.

2 Congress asked the FCC to investigate  
3 whether AT&T had violated Federal statute by providing  
4 access -- whether Verizon and AT&T violated Federal  
5 statute -- by providing access to this calling record  
6 information.

7 The FCC decided that it had no  
8 authority, and no ability to do so. It determined that  
9 Federal law prohibits the carriers from providing even  
10 the FCC with information about these activities. And  
11 because it couldn't collect the information, it couldn't  
12 possibly conduct an investigation.

13 Now, this Commission faces that same  
14 fundamental problem, that same fundamental, procedural  
15 obstacle this in trying to respond to the ACLU's request.

16 Because just as Federal law prohibits  
17 carriers from giving FCC access to information about  
18 these classified activities, so, too, is it going to  
19 prohibit this Commission from obtaining any of that  
20 information.

21 Carriers, obviously, can't waive the  
22 State Secrets Privilege. And Federal statutes make it a  
23 felony for AT&T to provide this information to this  
24 Commission, or to any state commissions, or even to the

1 FCC.

2 And for other reasons, which are alluded  
3 to in these papers and discussed --

4 CHAIR McRAE: Actually, they are rather  
5 explicitly set forth, more than alluded to.

6 MR. CARPENTER: Explicitly set forth.

7 The Federal Supreme Court decisions hold  
8 that state tribunal can't investigate national security  
9 activities and can't make demands of private companies to  
10 collect information that's relevant to these national  
11 security issues.

12 So, this Commission faces a much more  
13 fundamental barrier than trying to investigate these  
14 issues than even the FCC did.

15 And the futility of this exercise is  
16 illustrated by the events that I referred to at the  
17 outset that recently occurred in New Jersey.

18 Just by way of clarification. New  
19 Jersey is the only state that is trying to investigate  
20 this. Washington, Vermont, Maine, they are conducting  
21 proceedings in which they are deciding whether to  
22 investigate this.

23 The only state that has tried to  
24 investigate this and collect the relevant information



1 from the carriers is New Jersey.

2 In mid-May, the New Jersey Attorney  
3 General issued a subpoena to AT&T and Verizon and to  
4 several other carriers directing them to provide  
5 information about whether they were unlawfully providing  
6 this calling information to NSA. And the return date for  
7 the subpoena was June 15th.

8 On June 14th, the United States brought  
9 the lawsuit I alluded to. Asserted all of the reasons  
10 why Federal law preempted the state from conducting the  
11 investigation and preempted the carriers and barred the  
12 carriers from responding to any of the request for  
13 information.

14 CHAIR McRAE: You do not need to go  
15 through that because they are here in the material.

16 MR. CARPENTER: Fine, Your Honor. I  
17 will make one further point.

18 In light of all of this activity, there  
19 is no compelling reason for this Commission to go out on  
20 a limb and try to investigate this.

21 And we would submit that you dismiss  
22 this complaint, or at a minimum defer proceedings pending  
23 the outcome of all of this federal litigation that I  
24 referred to.

1 Thank you.

2 COMMISSIONER WINSLOW: Madam Chair, I  
3 have a question.

4 Has the U.S. Attorney's Office in  
5 Delaware been notified by any of the parties or this  
6 Commission that this activity is occurring on this agenda  
7 today?

8 MR. CARPENTER: No, Your Honor. I'm not  
9 aware of AT&T having notified them. Because at this  
10 moment, all you are doing is deciding whether to conduct  
11 a proceeding.

12 The time in which we would feel any need  
13 to tell any Federal authorities about this is if you  
14 actually decided to conduct the investigation and were  
15 making demands on the carriers that we couldn't adhere to  
16 without also violating Federal law.

17 And the mere fact that you're  
18 considering holding an investigation itself doesn't  
19 require us to do anything that would violate Federal law.  
20 So, there really has been no occasion for us to talk to  
21 the authorities in the U.S. Attorney's Office in  
22 Delaware.

23 COMMISSIONER WINSLOW: As you pointed  
24 out, you are the party in the middle. The aggrieved

1 party would be the United States Government; wouldn't it?

2 MR. CARPENTER: Yes. That's right, Your  
3 Honor. That's why the United States, when they brought  
4 this lawsuit, they sued not only the state authorities  
5 that were conducting the investigation, but the carriers.  
6 Because we have the information that the government says  
7 can't be disclosed to state authorities or anyone else  
8 consistent with overriding national security interest and  
9 requirements of Federal law.

10 CHAIR McRAE: Additional questions?

11 COMMISSIONER CLARK: Yes. It seems like  
12 ultimately this is going to have to be a decision decided  
13 by the Federal Court, the extent that it's privileged  
14 and what has to be disclosed.

15 You talked about a case being teed up.  
16 When do you reasonably expect, at least, at the District  
17 Court level, to have decisions come forward in this case?

18 MR. CARPENTER: It is hard to predict  
19 how fast the case will move.

20 The New Jersey Attorney General is  
21 currently making no attempts to enforce the subpoena.  
22 So, there is no motion for a preliminary injunction  
23 that --

24 COMMISSIONER CLARK: It doesn't look

1     like it was even pled. It was just a declaratory action.

2                     MR. CARPENTER: Declaratory judgment.

3     And simultaneously, the United States sent a letter,  
4     which was included in this voluminous material that set  
5     out the reasons why the New Jersey Attorney General  
6     should reconsider her actions, and ask that, at a  
7     minimum, she take no actions to enforce the subpoena  
8     pending the resolution of the case.

9                     And she has, at least, told us for the  
10    next 30 days, we have no obligation under the subpoena.

11                    And so, it's possible her posture will  
12    be we can wait for the outcome of the lawsuit. But maybe  
13    she will decide after 30 days that really she wants to  
14    enforce the subpoena and things be brought to a head.

15                    But in terms of these other Federal  
16    lawsuits, which are going to be making the determination  
17    whether this state secrets privilege has been properly  
18    invoked, they are moving on a pretty fast track.

19                    In the Hepting case in San Francisco,  
20    the United States' motion to dismiss is fully briefed,  
21    and it is being orally argued on June 23rd, later this  
22    week.

23                    So, there is a real prospect that there  
24    could be a decision, at least by a Federal District

1 Court, in one case fairly soon.

2 In a second case, the Terkel case, which  
3 is in Chicago, involves just the calling records. But  
4 the Hepting case involves allegations about traditional  
5 wire taps, as well as access to calling records.

6 But in the Terkel case in Chicago, the  
7 judge has set a schedule that would have Motion to  
8 Dismiss, including the Motion to Dismiss the United  
9 States argued on July 13rd.

10 So, there is a real prospect that there  
11 will be clarity quite soon, at least in terms of the  
12 decision by the District Court.

13 So, I think there are lots of reasons  
14 for the Commission, while we would just urge it to  
15 dismiss this case, there are lots of reasons for the  
16 Commission to defer, at a minimum, defer proceedings here  
17 and see what happens in this Federal litigation.

18 CHAIR McRAE: Can we hear from Verizon  
19 to the extent it is not duplicative? It would be  
20 appreciated.

21 MS. HYER: I will be very brief, and I  
22 will try not to duplicate too many of the points.

23 We agree with the synopsis that  
24 Mr. Carpenter has put forth.

1                   And we agree, also, that even though  
2   Ms. Graff is seeking to narrow down what it is that the  
3   ACLU is, in fact, trying to get access to, that  
4   necessarily requires this Commission to conduct an  
5   investigation of the activities of the National Security  
6   Agency and alleged cooperation by telephone companies  
7   with the NSA and its Anti-terrorist Program. There's no  
8   way around that.

9                   And the President has explained that the  
10   NSA and its Anti-terrorist Program is highly classified.  
11   And that includes the identities of any cooperating  
12   parties, and it includes the nature of the cooperation.  
13   It includes any process that may or may not have been  
14   provided. The scope of what might have been requested.  
15   All of that is highly classified information.

16                   And because of that, as we said in our  
17   press release that you have before you, we can't confirm  
18   or deny, as a matter of Federal law, whether we have any  
19   relationship whatsoever with that NSA program.

20                   It is a Federal felony to divulge  
21   classified information concerning the communication  
22   activities of the United States to any person that has  
23   not been authorized by the President or his lawful  
24   designee to obtain that information.

1                   And this Commission has not been  
2 authorized by the President to proceed with any  
3 information regarding classified activities of the  
4 National Security Agency.

5                   Other provisions of Federal law that are  
6 cited in AT&T's papers, that Mr. Carpenter alluded to  
7 also prohibit the disclosure of any information regarding  
8 the NSA activities, or any cooperation with them, or the  
9 scope of what might have been requested, or the scope of  
10 what may or may not have been turned over. All of that  
11 information is classified.

12                   As Mr. Carpenter also set forth, the  
13 Justice Department has asserted the state secrets  
14 privilege.

15                   It is not the case that in Washington,  
16 Maine, or Vermont that those commissions are actually  
17 conducting an investigation at this time. They are only  
18 considering whether to conduct that investigation.  
19 Vermont is considering that issue tomorrow. And Verizon  
20 has not even responded in anyway to the allegations in  
21 that proceeding.

22                   Same thing with Washington. Same thing  
23 with Maine. Maine is still at the briefing stage. No  
24 decision has been made by any of those commissions to

1 move forward with an investigation.

2 Therefore, the absence of the Department  
3 of Justice here today says nothing whatsoever about what  
4 their actions may or may not be if the commission were to  
5 move forward. And I am fairly competent if the  
6 commissions were to make a decision to go forward that  
7 their reaction would be similar to the reaction in  
8 response to the New Jersey Attorney General subpoena.  
9 And that reaction was fast and swift.

10 And as Mr. Carpenter indicated, the  
11 defendants in the lawsuit that was brought by the DOJ  
12 include the telephone companies. They are seeking to  
13 enjoin us from responding to any inquiry by the New  
14 Jersey State Government.

15 CHAIR McRAE: You mentioned a number of  
16 times, as Mr. Carpenter indicated.

17 Do you have some additional comments  
18 separate and apart from what Mr. Carpenter has already  
19 indicated?

20 MS. HYER: Nothing of substance to add,  
21 other than to state that Verizon's position is also that  
22 the Commission should move to dismiss, or should dismiss,  
23 excuse me, this proceeding and do so without prejudice.  
24 But we think it should be dismissed.



1                   But if the Commission chooses not to  
2                   dismiss at this time, you should definitely defer any  
3                   proceeding and wait for the outcome of the Federal cases  
4                   that will decide the threshold issues in this case about  
5                   whether or not any investigation by a State agency is  
6                   proper.

7                   Thank you.

8                   CHAIR McRAE: Now, I do believe in your  
9                   comments you attempted to respond to the various claims  
10                  that you knew were coming from AT&T and Verizon.

11                  Is there something additional that you  
12                  want to add or put forth before us? Not a review, please  
13                  but if there was some response that you did not  
14                  anticipate.

15                  MS. GRAFF: Yes, Your Honor. Thank you  
16                  very much.

17                  I would like to respond, with due  
18                  respect, to the very difficult position in which the  
19                  carriers find themselves.

20                  I would like to remind this Commission  
21                  that the Government has not intervened in this particular  
22                  case. Although, Mr. Carpenter is absolutely correct that  
23                  the private carrier cannot waive the state secrets  
24                  privilege, they also cannot establish, it has been

1 established or asserted yet in this case which is before  
2 you today.

3 To my knowledge, the information that we  
4 are seeking has not been certified as classified  
5 information under Title 18 Section 798. If it has, then  
6 someone should be letting this Commission know about  
7 that.

8 Furthermore, I would suggest, again,  
9 with all due respect, that this Commission just as easily  
10 as dismissing or deferring could actually initiate an  
11 investigation in deferring enforcement or defer the  
12 response time and any interrogatories that you issue  
13 until after the pending cases, if that would make the  
14 Commissioners feel more comfortable.

15 But what is clear is that someone in  
16 this room needs to be looking out for the privacy and  
17 consumer protection rights of Delaware telephone  
18 subscribers.

19 And the companies in this room feel that  
20 they are unable to do so at the moment.

21 CHAIR MCRAE: Thank you. Commissioner  
22 Winslow.

23 COMMISSIONER WINSLOW: Madam Chair, out  
24 of curiosity, I hear over here that they can't say yes or

1 no, to answer your question. But it's off the record,  
2 but my recollection is, the "GNAP" (phonetic)  
3 organization is not terribly concerned about the possible  
4 felony prosecution because they came out immediately and  
5 said, No, if I recall correctly, we're not doing that.

6 Has there been any action against them  
7 by the Federal Government to enforce any type of criminal  
8 penalty?

9 MS. GRAFF: To my knowledge, no criminal  
10 prosecution has taken place against request.

11 COMMISSIONER CLARK: I can tell you my  
12 thoughts on it, for discussion purposes.

13 I mean, it seems like it's a pretty  
14 important issue that you're asking us to look into. And  
15 it seems like in the end, this is going to have to be  
16 decided in the Federal Courts, since it is going to be a  
17 Federal preemption and Federal privilege issue.

18 So, for us to be out in front of it in a  
19 situation where in another jurisdiction they are going to  
20 have to make a decision whether or not this issue can go  
21 forward, I don't think that's a position that, at least  
22 at this stage, I feel comfortable asserting ourselves  
23 into.

24 I don't have any objection, and I will

1 put it in the form of a motion, of deferring the  
2 proceeding for six months to come back, and at that time,  
3 if you choose to, to re-invigorate the docket to come  
4 forward with what some of the Federal cases have decided  
5 in this issue. And at that point, if it is appropriate,  
6 to go ahead and investigate the matter at that time. I  
7 don't know what the rest of the Commission would want to  
8 do.

9 CHAIR McRAE: Put it in the form of the  
10 motion.

11 COMMISSIONER CLARK: I would like to  
12 move at this time that for the aforementioned reasons  
13 that I stated that the matter be deferred for a period of  
14 six months and at which can be brought back at the  
15 request of the litigants and brought forward at that  
16 time.

17 COMMISSIONER WINSLOW: At the request of  
18 the litigants or the complainants.

19 COMMISSIONER CLARK: The complainants.

20 COMMISSIONER CONAWAY: I will second  
21 that motion.

22 CHAIR McRAE: It has been moved and  
23 seconded.

24 I would just call for the comment that

1 an additional reason why that would be advisable in our  
2 circumstance because we are resource constrained. And it  
3 would be, to some extent, duplicative to put the staff  
4 and other parties that work on this, when, in fact, the  
5 same issue was going to be addressed in a number of other  
6 jurisdictions in one way or another.

7 COMMISSIONER CLARK: Just along those  
8 same lines, too, it is a situation, too, with the Federal  
9 Communications Act, where the FCC, itself, didn't want to  
10 examine this issue at this time based on that privilege.  
11 And they got a pretty broad purview to look into these  
12 issues, also, under the Federal statutes, and they've  
13 declined to do it. And for that reason, at this time, we  
14 should decline, too, and revisit the issue should you  
15 want to bring it forward in the future.

16 CHAIR McRAE: As Commissioner Clark  
17 said, it is not to minimize the importance of the issue.  
18 It is the practicabilities of the moment that drive this  
19 process. And certainly, if there is some developments in  
20 six months or sooner, I would even say, the Commission's  
21 door is not closed.

22 We do have a motion on the floor at this  
23 point.

24 CHAIR McRAE: All those in favor.

1 Yea.

2 COMMISSIONER LESTER: Yea.

3 COMMISSIONER WINSLOW: Yea.

4 COMMISSIONER CONAWAY: Yea.

5 COMMISSIONER CLARK: Yea.

6 CHAIR McRAE: Opposed? Thank you.

7 (The Public Service Commission Hearing  
8 was concluded at, approximately, 1:45 p.m.)

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## 1 C E R T I F I C A T E

2 STATE OF DELAWARE:

:

3 NEW CASTLE COUNTY:

4 I, Gloria M. D'Amore, a Registered  
5 Professional Reporter, within and for the County and  
6 State aforesaid, do hereby certify that the foregoing  
7 Public Service Commission Hearing, was taken before me,  
8 pursuant to notice, at the time and place indicated; that  
9 the statements of said parties was correctly recorded in  
10 machine shorthand by me and thereafter transcribed under  
11 my supervision with computer-aided transcription; that  
12 the Public Service Commission Hearing is a true record of  
13 the statements given by the parties; and that I am  
14 neither of counsel nor kin to any party in said action,  
15 nor interested in the outcome thereof.

16 WITNESS my hand and official seal this  
17 22nd day of June A.D. 2006.

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GLORIA M. D'AMORE

REGISTERED PROFESSIONAL REPORTER

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CERTIFICATION NO. 119-PS

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